

May 5 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No.: DA-09-0510

STATE OF MONTANA, EX REL. DEPARTMENT
OF ENVIRONMENTAL QUALITY,

Plaintiff and Appellant,

v.

BNSF RAILWAY COMPANY,

Defendant and Appellee and Cross Appellant

FILED

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

**APPELLEE AND CROSS APPELLANT, BNSF RAILWAY
COMPANY'S UNOPPOSED MOTION FOR LEAVE TO FILE
OVERLENGTH BRIEF**

On Appeal from the First Judicial District Court, Lewis and Clark County
The Honorable Jeffrey M. Sherlock, Presiding
District Court Cause No. BDV 2004 -596

Appearances:

Leo Berry
Oliver H. Goe
Mark D. Etchart
Chad E. Adams
BROWNING, KALECZYC, BERRY &
HOVEN, P.C.
825 Great Northern Blvd., Suite 105
Helena, MT 59601
Telephone: (406) 443-6820
Email: chad@bkbh.com

*Attorneys for Appellee/Cross-
Appellant*

Paul Lawrence
K&L GATES LLP
925 Fourth Avenue Suite 2900
Seattle, WA 98104-1158
Telephone: (206) 623-7580
Facsimile: (206) 623-7022
Email: paul.lawrence@klgates.com

*Attorneys for Appellee/Cross-
Appellant*

R. Allan Payne
Marc G. Guyske
DONEY CROWLEY BLOOMQUIST
PAYNE UDA PC
Diamond Block, Suite 200
44 West 6th Avenue
P.O. Box 1185
Helena, MT 59624-1185
Telephone: (406) 443-2211
Facsimile: (406) 449-8443
Email: rpayne@doneylaw.com
Attorneys for Appellant

Cynthia D. Brooks
Special Assistant Attorney General
MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY
1100 North Last Chance Gulch
PO Box 200901
Helena, MT 59620-0901
Telephone: (406) 841-5020
Facsimile: (406) 841-5050
Email: cbrooks@mt.gov
Attorneys for Appellant

BNSF Railway Company (“BNSF”), the Appellee and Cross Appellant in the above-styled appeal, respectfully moves this Court for leave to file an overlength brief. BNSF seeks leave to file its combined answer brief with up to an additional 5,000 words, for a total of 15,000 words. Counsel for the Appellant, R. Allan Payne, has been contacted regarding this motion and stated that Appellant does not oppose the motion.

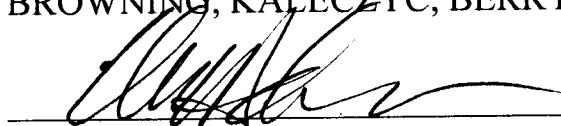
BNSF respects the heavy workload of this Court, and the purpose of word-length limitations. However, due to the numerous and complex issues of first impression raised in this appeal, it would do little service to the parties or this Court to not allow full and thorough briefing on the issues raised in the appeal and cross-appeal. This appeal follows several years of litigation and resulting trial involving Montana’s “Superfund” law, the Comprehensive Environmental Cleanup and Responsibility Act, Mont. Code

Ann. §§ 75-10-701, *et seq.* (“CECRA”). This Court has never addressed the substantive provisions of CECRA involved in this appeal. *Accord* Appellant’s Brief at 2-3 (noting this appeal addresses complex issues of first impression). BNSF will respond to nearly 50 pages of argument raised by Appellant, as well as present numerous issues which BNSF has raised on cross-appeal. The complexity of the issues raised, the fact that these are issues of first impression, and the number of issues raised on appeal amount to the extraordinary justification required in order to obtain leave to file an overlength brief.

Pursuant to Mont. R. App. P. 12(10), counsel for BNSF has attached hereto an affidavit demonstrating the justification for seeking leave to file an overlength brief. A proposed order has also been filed for the convenience of the Court.

Dated this 4th day of May, 2010.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

A handwritten signature in black ink, appearing to read "Chad E. Adams", is written over a horizontal line.

Chad E. Adams

Attorneys for BNSF Railway Co.

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing **APPELLEE AND CROSS APPELLANT, BNSF RAILWAY COMPANY'S UNOPPOSED MOTION FOR LEAVE TO FILE OVERLENGTH BRIEF** with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing upon the following:

Cynthia D. Brooks
Special Assistant Attorney General
MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY
1100 North Last Chance Gulch
PO Box 200901
Helena, MT 59620-0901
Attorneys for MDEQ

R. Allan Payne
Marc G. Buyske
DONEY CROWLEY BLOOMQUIST PAYNE UDA PC
Diamond Block, Suite 200
44 West 6th Avenue
P.O. Box 1185
Helena, MT 59624-1185
Attorneys for MDEQ


BROWNING, KALECZYC, BERRY & HOVEN

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AFFIDAVIT OF CHAD E. ADAMS

STATE OF MONTANA)
 :ss
County of Lewis and Clark)

I, Chad E. Adams, being first duly sworn upon my oath, depose and state
that:

1. I am one of the counsel of record for the Defendant/Appellee and
Cross Appellant BNSF Railway Company in the above-captioned action, and I am
over the age of 18 years and competent to testify to the matters contained herein.
2. This appeal presents important issues of first impression regarding the
interpretation and application of Montana's "Superfund" law, the Comprehensive

Environmental Cleanup and Responsibility Act, Mont. Code Ann. §§ 75-10-701, *et seq.* (“CECRA”).

3. After years of complex litigation in the district court and resulting trial, the Appellant, Montana Department of Environmental Quality (“MDEQ”) has filed its opening brief raising four issues on appeal. MDEQ appeals, among other things, the district court’s application of CECRA regarding the scope of MDEQ’s authority to determine cleanup levels at CECRA sites and the scope and application of joint and several liability under CECRA. In addressing these issues, MDEQ has filed a 9,990 word brief.

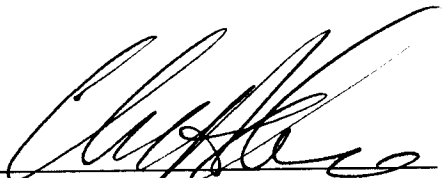
4. BNSF is required to respond to the four issues raised in MDEQ’s opening brief, (including the novel CECRA issues raised by DEQ), and also to address several issues of first impression regarding CECRA which BNSF has raised via cross appeal. These novel issues include the effect of settlements by CECRA liable parties during or prior to litigation on remaining parties, the standards for allowing settlements with third or non-parties during CECRA litigation, the interpretation of CECRA’s abatement provisions, the correct interpretation of CECRA’s “arranger” liability provisions, and whether DEQ is simultaneously allowed to pursue administrative and judicial remedies under CECRA.

5. The issues presented in this appeal are not only issues of first impression, but are complex and numerous. The 10,000 word limit is insufficient for BNSF to appropriately address each of these issues and fully inform the court regarding the law applicable to these issues. MDEQ acknowledges in their opening brief that this appeal presents “important issues of first impression.” Appellant’s Br. 2-3.

6. Counsel for MDEQ, R. Allan Payne, was contacted regarding BNSF’s request to file an overlength brief and indicated that he would not oppose BNSF’s request. Mr. Payne indicated he did not oppose BNSF’s motion, and suggested MDEQ may also seek leave to file an additional 5,000 words in their reply brief, to which BNSF would have no objection.

7. Because of the complex, numerous issues of first impression, this appeal presents extraordinary justification for allowing leave to file an overlength brief.

Dated this 4th day of May, 2010.


Chad E. Adams

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This document was subscribed and sworn before me on this 4th day of May, 2010, by Chad E. Adams.

(SEAL)

Kathleen Summers
Notary Public for the State of Montana
Print Notary Name Kathleen Summers
Residing at: Helena, Montana
My Commission expires: June 1, 2011